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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Larry Eugene Varvel,)	No. CIV 11-0278-PHX-FJM (DKD)
)	
Petitioner,)	
)	
vs.)	REPORT AND RECOMMENDATION
)	
Charles L. Ryan, et al.,)	
)	
Respondents.)	
)	

TO THE HONORABLE FREDERICK J. MARTONE, U. S. DISTRICT JUDGE:

Larry Eugene Varvel filed a timely Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 10, 2011, and an Amended Petition on March 4, challenging his convictions for sexual conduct with a minor and sexual abuse of a minor, and the imposition of a five-year prison term to be served consecutively to a life sentence. In Ground One, Varvel alleges that the victim was coerced and lied. He also contends that his sixth amendment rights were violated because his attorneys did not impeach the inconsistencies in another witness’s testimony. In Ground Two, Varvel challenges the sufficiency of the evidence and the credibility of the witnesses. Respondents allege that the grounds are either not cognizable on habeas review or unexhausted and procedurally defaulted. For the reasons stated below, the Court recommends that the petition be denied and dismissed with prejudice.

BACKGROUND

The facts surrounding the convictions are summarized in the court of appeals memorandum decision:

1 The victim is a child who is developmentally delayed,
2 and is Defendant's step-granddaughter. The victim and her
3 mother, Lisa, who is also developmentally delayed, previously
4 lived with Defendant and his wife, Nancy, her maternal
5 grandmother. Defendant and his wife were involved with
6 overseeing the care of both Lisa and her daughter.

7 Nancy died on December 1, 2006, after a long illness.
8 After she passed away, Defendant continued to do things with
9 his step-granddaughter, including taking her to church and to the
10 zoo. One night before Christmas in 2006, Lisa and the child
11 spent the night at Defendant's house.

12 A few days later, Defendant called Lisa to ask if he could
13 take the child to church. Lisa's son, Sam, who was visiting at
14 the time, answered the phone and asked the child whether she
15 wanted to go to church with Defendant. The child looked at
16 Sam with "fear in her eyes like . . . something had happened,"
17 and then told him that Defendant had touched her. This was the
18 first time that Sam had ever seen such a look on the child's face,
19 and the first time she had ever expressed a reluctance to go with
20 Defendant. When he saw the look on her face, Sam told
21 Defendant he would call him back and hung up.

22 Sam was confused and upset by his sister's declaration.
23 He immediately took her to the home of Lisa's older sister, his
24 Aunt Darci, to ask her advice on how to proceed. The child
25 "provide[d] details" to Darci about what Defendant had done
26 and why she did not want to go to church with him. The child
27 was "very fearful, very scared, and very upset." Darci had never
28 seen her niece "with the demeanor she had that day." Darci
instructed Sam to call the police. Phoenix Police Officers
responded and interviewed Sam and Darci separately.

The following day the child was taken to John C. Lincoln
Hospital for an examination. The hospital reported the matter
to the Maricopa County Sheriff's Office, and Detective Rodrigo
Rojas contacted the family. After he talked to Sam, the
detective made arrangements to have the child interviewed and
examined at Child Help "because she needed to be interviewed
by a more skilled or specially trained forensic interviewer."

The child was interviewed on January 3, 2007, by
Michele Becker ("Becker"), an investigative interview specialist
trained in interviewing developmentally delayed children, at the
Phoenix Child Help Children's Center. Prior to the interview,
Becker reviewed an initial police report, met with Rojas, and
also spoke with Darci and Lisa. She then conducted her
recorded forensic interview of the child.

During the interview, the child told Becker that
Defendant had "touched her" while her grandmother was in
heaven. She explained that the event had occurred at

1 Defendant's house, while mommy was asleep on the couch. The
2 child pointed between her legs and stated that he had put lotion
3 down there, and took off her clothes and "kissed my titties."
She also said that Defendant touched her "pee pees" and
described Defendant's hand going into her "pee pees."

4 Jacqueline Hess ("Hess"), a family nurse practitioner for
5 Child Help, conducted a thorough medical examination of the
6 child. The results of the overall physical and genital
7 examinations rendered "completely normal" results. Hess was
8 not surprised because "more than 95 percent" of children that
9 report sexual abuse have normal examinations. She testified
that there were many reasons for the normal examination,
including, for example, the amount of time between the event
and the examination, the fact that genital tissue heals very
rapidly, or the fact that the type of sexual contact that occurred
might not have created any type of injury.

10 The detective interviewed Defendant in February 2007,
11 and he denied any wrongdoing. He was arrested in June 2007,
12 and charged with sexual conduct with a minor under the age of
13 fifteen, a Class 2 felony, and dangerous crime against children,
and sexual abuse of a minor under the age of fifteen, a Class 3
felony, and dangerous crime against children.

14 (Doc. 13, Exh H at 2-5).

15 On direct review, Varvel argued two errors by the trial court: (1) the denial of his
16 Rule 20 motion for judgment of acquittal because of insufficient evidence of sexual conduct
17 with a minor; and (2) the admission of an unredacted report of the victim's forensic medical
18 examination (*Id.*, Exh E). On December 22, 2009, the court of appeals affirmed Varvel's
19 convictions and sentences. In doing so, the court determined that (1) the State had presented
20 sufficient evidence of sexual conduct with a minor; (2) the statements contained in the
21 medical report were properly admitted for the limited purpose of demonstrating what
22 information the nurse had before examining the victim; and (3) there was no confrontation
23 clause violation in the admission of the medical report because the statements were not
24 admitted for the truth of the matter asserted (*Id.*, Exh H).

25 On January 12, 2010, Varvel filed a Notice of Post-Conviction Relief (*Id.*, Exh I).
26 Appointed counsel filed a Notice of Post-Conviction Review, indicating to the trial court that
27 she had reviewed the record and could find no colorable claim for relief (*Id.*, Exh K). The
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1 trial court granted Varvel leave to file a *pro per* petition (*Id.*, Exh L). Varvel filed a letter
2 dated June 18, 2010 in which he argued the following: (1) trial counsel was ineffective for
3 failing to ask certain questions of the State's witnesses; (2) the victim was told what to say
4 by her brother and sister; and (3) the evidence was insufficient to support the convictions
5 (*Id.*, Exh M). The trial court determined that the letter did not comply with the filing
6 procedures outlined in Ariz. R. Crim. P. 32.5, and granted Varvel additional time to file a
7 proper petition. Varvel filed a second letter setting forth similar claims; on September 9,
8 2010, he filed a post-conviction relief form, attaching his June 18 letter to the form (*Id.*, Exh
9 O, P). The State argued in its response that the petition should be dismissed because it did
10 not comply with the rules, it failed to raise any proper claims, cite to the record or any
11 applicable case law, or allege any facts which would entitle him to relief (*Id.*, Exh Q). The
12 trial court summarily dismissed the petition (*Id.*, Exh S).

13 **EXHAUSTION OF REMEDIES**

14 A state prisoner must exhaust his state remedies before petitioning for a writ of habeas
15 corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-
16 66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust
17 state remedies, a petitioner must fairly present his claims to the state's highest court in a
18 procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-846 (1999). In
19 Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by
20 properly pursuing them through the state's direct appeal process or through appropriate post-
21 conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v.*
22 *Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). A claim has been fairly presented if the petitioner
23 has described both the operative facts and the federal legal theory on which the claim is
24 based. *Bland v. Cal. Dep't of Corrections*, 20 F.3d 1469, 1472-73 (9th Cir.1994), *overruled*
25 *on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc); *Tamalini*
26 *v. Stewart*, 249 F.3d 895, 898 -99 (9th Cir. 2001). The exhaustion requirement will not be
27 met where the Petitioner fails to fairly present his claims. *Roettgen*, 33 F.3d at 38.

1 If a petition contains claims that were never fairly presented in state court, the federal
2 court must determine whether state remedies remain available to the petitioner. *See Rose v.*
3 *Lundy*, 455 U.S. 509, 519-20 (1982); *Harris v. Reed*, 489 U.S. 255, 268-270 (1989)
4 (O'Connor, J., concurring). If remedies are available in state court, then the federal court
5 may dismiss the petition without prejudice pending the exhaustion of state remedies. *Id.*
6 However, if the court finds that the petitioner would have no state remedy were he to return
7 to the state court, then his claims are considered procedurally defaulted. *Teague v. Lane*, 489
8 U.S. 288, 298-99 (1989); *White v. Lewis*, 874 F.2d 599, 602-605 (9th Cir. 1989). The federal
9 court may decline to consider these claims unless the petitioner can demonstrate that a
10 miscarriage of justice would result, or establish cause for his noncompliance and actual
11 prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S.
12 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*,
13 433 U.S. 72, 86 (1977); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

14 Further, a procedural default may occur when a Petitioner raises a claim in state court,
15 but the state court finds the claim to be defaulted on procedural grounds. *Coleman*, 501 U.S.
16 at 730-31. In such cases, federal habeas review is precluded if the state court opinion
17 contains a plain statement clearly and expressly relying on a procedural ground "that is both
18 'independent' of the merits of the federal claim and an 'adequate' basis for the court's
19 decision." *See Harris*, 489 U.S. at 260. A state procedural default ruling is "independent"
20 unless application of the bar depends on an antecedent ruling on the merits of the federal
21 claim. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985); *Stewart v. Smith*, 536 U.S. 856
22 (2002). A state's application of the bar is "adequate" if it is "'strictly or regularly followed.'" *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quoting *Hathorn v. Lovorn*, 457 U.S. 255,
24 262-63 (1982)). In cases in which a state prisoner has defaulted his federal claims in state
25 court pursuant to an independent and adequate state procedural rule, just as in cases
26 involving defaulted claims that were not fairly presented, federal habeas review of the claims
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1 is barred unless the prisoner can demonstrate a miscarriage of justice or cause and actual
2 prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

3 **DISCUSSION**

4 In Ground One, Varvel argues that the victim was coerced into giving her statement
5 to the investigative specialist, and lied about the incident. He also argues that trial counsel
6 was ineffective for not pointing out the inconsistencies in the testimony of Lisa, the victim's
7 mother. In Ground Two, he argues about the credibility of witnesses' testimony, essentially
8 contending that such testimony was insufficient evidence to convict him. Varvel's
9 sufficiency of the evidence claim was not raised on direct review as a federal constitutional
10 claim. Proper exhaustion requires that Varvel have fairly presented to the state courts the
11 exact federal claim he is raising in his federal habeas petition, and in doing so describe the
12 facts and federal legal theory upon which the claim is based. *Bland*, 20 F.3d at 1472.
13 Because Varvel failed to alert the state court to a federal constitutional claim, his sufficiency
14 of the evidence claim is unexhausted. *O'Sullivan*, 526 U.S. at 845. Because a return to state
15 court would be futile, the claim is procedurally defaulted. *Teague*, 489 U.S. at 297-99.

16 His remaining claims that trial counsel was ineffective, and that the victim was
17 coerced, were raised in his post-conviction petition, which the trial court dismissed for failure
18 to present a colorable claim for relief. Varvel failed to petition for review in either the
19 Arizona Court of Appeals or the Arizona Supreme Court. Because of this, these claims were
20 never properly exhausted, and because these claims cannot be raised in a successive post-
21 conviction petition, a return to state court would be futile. Therefore, these claims are also
22 procedurally defaulted. Finally, Varvel has shown no miscarriage of justice or cause and
23 actual prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

24 **IT IS THEREFORE RECOMMENDED** that Larry Eugene Varvel's Amended
25 Petition for Writ of Habeas Corpus be **denied and dismissed with prejudice** (Doc. 6).

1 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
2 to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition is
3 justified by a plain procedural bar and jurists of reason would not find the ruling debatable.

4 This recommendation is not an order that is immediately appealable to the Ninth
5 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
6 Appellate Procedure, should not be filed until entry of the district court's judgment. The
7 parties shall have fourteen days from the date of service of a copy of this recommendation
8 within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1);
9 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
10 days within which to file a response to the objections. Failure timely to file objections to the
11 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report
12 and Recommendation by the district court without further review. *See United States v.*
13 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any
14 factual determinations of the Magistrate Judge will be considered a waiver of a party's right
15 to appellate review of the findings of fact in an order or judgment entered pursuant to the
16 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

17 DATED this 13th day of September, 2011.

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David K. Duncan
United States Magistrate Judge